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No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION, AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The National Employment Lawyers Association ("NELA"), the American Civil Liberties Union ("ACLU"), and Trial Lawyers for Public Justice ("TLPJ") submit this brief as *amici curiae*.

NELA, a voluntary membership organization of more than 3,000 attorneys nationwide, is the country's only professional membership organization of lawyers who regularly represent workers in employment, labor, and civil rights disputes. As part of its advocacy efforts, NELA regularly supports litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that those laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); and *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 69 U.S.L.W. 4195 (2001).

NELA is very familiar with the mandatory arbitration issues involved in this case, as in recent years, thousands of American workers represented by NELA's members have been forced to execute mandatory pre-dispute

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[1] The parties to this case have consented to the filing of this brief as provided for in the Rules of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

employment arbitration agreements as a non-negotiable condition of their employment. NELA and its members have thereby developed a unique perspective on the issues raised by these agreements and their specific impact on workers who have suffered workplace discrimination.

The American Civil Liberties Union is a nationwide, nonprofit and nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Women's Rights Project of the ACLU has, in particular, appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*, in cases involving the interpretation of those civil rights laws and the proper role of the EEOC in enforcing the federal antidiscrimination mandate. Because this case raises those questions once again, its resolution is a matter of significant concern to the ACLU and its members.

TLPJ is a national public interest law firm that specializes in precedent-setting and socially-significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. TLPJ believes that arbitration, knowingly agreed to and fairly structured, can be a valuable mechanism for resolving appropriate legal disputes. In the past decade, however, an increasing number of corporations have attempted to cap their statutory and common law liability by forcing customers, employees, and vendors to participate in arbitration systems that are so unfair that most reasonable people simply will not pursue their claims. Three years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat such abuses. Through this project, our research has revealed that individuals are frequently deterred from pursuing claims in arbitration by the growing and prohibitive costs charged in many arbitration systems; indeed, in some cases, the arbitration fees exceed the amount of money in dispute. We submit this brief to bring these facts to this Court's attention—and to review their implications for this Court's analysis in this case.

SUMMARY OF ARGUMENT

Amici fully agree with petitioner that the Fourth Circuit's ruling impermissibly deprives the *EEOC* of its statutory power to investigate fully and seek relief for victims of disability discrimination under the ADA. We write separately to emphasize that the ruling below also impermissibly deprives *Mr. Baker* of his independent substantive statutory right to seek the cost-free assistance of the EEOC in obtaining make-whole relief under the ADA.

As a practical matter, the Fourth Circuit's ruling leaves workers like Mr. Baker with no remedy at all. The Waffle House arbitration agreement incorporates the procedures set forth in the Commercial Rules of the American Arbitration Association, which require claimants to pay a $2,000 filing fee just to initiate an arbitration, and to pay substantial ongoing daily forum and arbitrator fees. Waffle House's agreement also imposes an additional economic burden by requiring victims of

discrimination to pay for one-half of all arbitration costs, whether they eventually win or lose, notwithstanding the fee- and cost-shifting provisions of the ADA and other federal anti-discrimination laws. These provisions have an enormous chilling effect and erect an economic barrier that cannot be overcome by low-wage workers like Mr. Baker, whom Waffle House was paying a mere $5.50 per hour before it fired him—the equivalent of $11,000 per year before taxes and payment of basic living expenses.

We further write to respond briefly to the "assum[ption]" underlying the question presented to this Court—that the agreement between Waffle House and Mr. Baker in this case was "valid" and would have been judicially enforceable against Mr. Baker in a private action. *See* Petition for *Certiorari* at 10 n.2; Brief in Opposition at 8-9. While this assumption allows the Court directly to reach the question presented, it is wrong as a matter of both law and fact. The record in this case demonstrates that Mr. Baker neither knowingly nor voluntarily agreed to arbitrate any ADA or other statutory discrimination claims against Waffle House. The record further demonstrates that the mandatory arbitration procedures established by Waffle House's agreement were, in several respects, not adequate to protect his statutory rights. Consequently, although the Court may "assume" the validity of the private agreement between Waffle House and Mr. Baker in order to reach the question presented, it should make clear that no question concerning the validity of that agreement has been presented or is being addressed. The validity of the Waffle House agreement with Mr. Baker is, at a minimum, a matter of substantial controversy. Nothing in the Court's opinion should endorse, explicitly or implicitly, the enforceability of such an agreement in a private action.

ARGUMENT

AN EMPLOYER CANNOT FORCE ITS WORKERS TO WAIVE THEIR STATUTORY RIGHT TO SEEK COST-FREE REPRESENTATION BY THE EEOC IN PURSUING DISCRIMINATION CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT.

Eric Scott Baker was earning $5.50 per hour when respondent Waffle House fired him from his job as a hot grill operator, allegedly in violation of the Americans with Disabilities Act. C.A. App. 29. At $5.50 per hour, assuming Mr. Baker worked 40 hours per week for 50 weeks each year, his gross annual pre-tax salary would have been $11,000. For low-wage workers like Mr. Baker who have been the victims of employment discrimination, the statutory right to seek cost-free representation by the EEOC may be the only meaningful avenue for obtaining make-whole relief from an employer that has unlawfully discriminated. To construe Waffle House's mandatory arbitration agreement as waiving the statutory right to seek the EEOC's cost-free representation in pursuing make-whole relief would be to deny workers in Mr. Baker's circumstances the right to be free from unlawful discrimination.

1. The Americans with Disabilities Act Guarantees Disabled Americans the Right to Seek Cost-Free Representation By the EEOC When Their Anti-Discrimination Rights Have Been Violated.

The ADA guarantees workers not only the right to bring individual damages actions in federal or state court, but the independent right to file claims with the EEOC, thereby seeking the EEOC's *cost-free* assistance in investigating and prosecuting claims of workplace disability discrimination. *See* 42 U.S.C. §12117; 42

U.S.C. §2000(e)-5(f)(1).[2] This statutory right to cost-free federal assistance, established by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, is mirrored in the statutory schemes of most other federal and state anti-discrimination and worker protection statutes.[3] As Congress has concluded, the EEOC's active involvement in investigating and prosecuting claims of workplace discrimination is essential to accomplishing the statutory goals of protecting workers and deterring future violations of these critically important statutory anti-discrimination rights.[4]

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[2] The ADA, 42 U.S.C. §12117, incorporates the "powers, remedies, and procedures set forth in" several sections of Title VII. Among those sections is 42 U.S.C. §2000e-5(f)(1), which authorizes the EEOC to bring its own civil action against an employer that it believes has violated the Act. It also provides that if the EEOC chooses not to file a civil action in its own name but issues a right to sue letter, "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and *may authorize the commencement of the action without the payment of fees, costs, or security.*" (emphasis supplied).

[3] The EEOC provides these services pursuant to Title VII, 42 U.S.C. §§2000e-5(b), (e), (f), and the ADEA, 29 U.S.C. §626, as well as the ADA. The Department of Labor provides similar services pursuant to the FLSA. *See* 29 U.S.C. §216(c). The National Labor Relations Board's Office of General Counsel provides these services pursuant to the NLRA. *See* 29 U.S.C. §160(b), (e). Most state anti-discrimination statutes provide similar cost-free assistance by state administrative agencies as well. *See, e.g.*, Cal. Govt. Code §12960-76; S.C. Code Ann. Stats. §1-13-90(d).

[4] *See, e.g.*, 42 U.S.C. §12101(b) ("It is the purpose of this chapter – . . . (2) to provide clear, strong, consistent, enforce-

(continued...)

2. As Construed By the Fourth Circuit, Waffle House's Arbitration Agreement Impermissibly Forces Workers to Waive Their Substantive Statutory Right to Seek the EEOC's Assistance in Protecting Their Right to Be Free From Disability Discrimination and Forces Them to Pay Forum Costs That Undermine Congress' Efforts to Lower Economic Barriers for Victims of Discrimination.

This Court has repeatedly stated that mandatory, predispute arbitration agreements cannot be construed in a manner that will deprive employees of substantive statutory rights. Employment arbitration agreements encompassing statutory claims are enforceable only insofar as they merely shift the forum in which the protected party may seek full vindication of such rights. *See, e.g., Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 69 U.S.L.W. 4195, 4201 (2001), *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28 (1991), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-32, 637 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"); *Alexander v. Gardner-Denver*, 415 U.S. 36, 51, 56-58 (1974). The Waffle House agreement, as

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[4] (...continued)
able standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities); *see also General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980) (Congress gave the EEOC the "primary burden of litigation [and] . . . sought to . . . bring about more effective enforcement of private rights").

construed by the Fourth Circuit, does not merely shift the forum. It effects an impermissible waiver of its employees' substantive statutory protections by stripping them of their right under the ADA and other statutes to seek the cost-free assistance of the EEOC in obtaining make-whole relief.

Although Congress in the ADA and other anti-discrimination statutes guaranteed cost-free access to the EEOC, the Waffle House arbitration agreement is anything but cost-free. As a condition of applying for employment at the Waffle House restaurant in Columbus, South Carolina, Mr. Baker was required to agree to arbitrate any future employment-related claim "under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made" with "[t]he costs and expenses of the arbitration [to] be borne evenly by the parties." C.A. App. 26. At the time Waffle House filed its motion to compel arbitration (and continuing to the present), the AAA Commercial Arbitration Rules imposed substantial filing fees and other costs far beyond Mr. Baker's ability to pay, including: 1) a $2,000 filing fee that the claimant had to pay up front; 2) a $250 daily administrative fee to be split by the parties; and 3) hourly fees for the individual arbitrator (or arbitrators) to be split by the parties, which in even a single-arbitrator case could easily reach an additional $3,400 per day ($425 per hour × eight hours per day).[5]

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[5] *See* C.A. App. 54, 74-79; *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1062 & n.2 (11th Cir. 1998) (concurring opinion of Cox, Tjoflat, JJ.). Those fees are (continued...)

Merely to begin the arbitration process, then, Mr. Baker would have had to pay at least $2,000—the equivalent of 10 weeks' salary (in a job where he was fired after less than one month). By the end of a two-week arbitration, his total share of the AAA arbitration fees could have exceeded $20,000—the equivalent of almost two years' salary. No low-wage worker like Eric Baker can afford to pursue ADA rights in arbitration if forced to pay such high filing and forum fees.

As a practical reality, by forcing its workers to arbitrate all employment-related claims under the AAA Commercial Arbitration Rules, Waffle House has erected

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[5] (...continued)
now even *higher*. *See* http://www.adr.org/ (AAA Commercial Dispute Resolution Procedures, as amended September 1, 2000).

Although the applicable AAA Commercial Arbitration Rules provided a minimum filing fee of $500 for claims below $10,000 (with a sliding scale that could raise the threshold filing fee to as much as $11,000, C.A. App. 78), those Rules stated that "[w]hen no amount can be stated at the time of filing, the minimum fee is $2,000, subject to increase when the claim or counterclaim is disclosed." C.A. App. 78. Here, although the EEOC did not state a specific demand in its complaint (*see* C.A. App. 10-11), the combined request for back pay, front pay, compensatory, and punitive damages certainly was well in excess of $10,000.

The AAA Commercial Arbitration Rules also provided, and continue to provide, that in addition to the claimant being required to pay the filing fee up front (C.A. App. 74, 78), "[t]he AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case." C.A. App. 75.

an economic hurdle that precludes those workers from prosecuting their statutory anti-discrimination claims. The chilling effect of those high threshold fees on a worker's ability to vindicate statutory rights is enormous, particularly where as here, the employer, through the explicit terms of the arbitration agreement, has also overridden the statutory right to cost-shifting for prevailing plaintiffs. *See* 42 U.S.C. § 12205, 42 U.S.C. §2000e-5(k). By imposing its expensive arbitral regime on workers as a non-negotiable condition of their employment, Waffle House has effectively unilaterally opted out of the principal statutory enforcement mechanism created by Congress to deter employers from engaging in unlawful disability discrimination.

In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513 (2000), this Court addressed the potential impact of burdensome arbitration costs in considering "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." 121 S.Ct. at 517.[6] Because "the arbitration agreement was silent with respect to payment of filing fees, arbitrators' costs, and other arbitration expenses," and because the record "contain[ed] hardly any information" about whether plaintiff would bear such "large arbitration costs" plaintiff would be precluded, as a practical matter, from "effectively vindicating her federal statutory rights in the arbitral forum." Thus, this Court concluded that "[t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." 121 S.Ct. at 522.

[6] Although the New York Stock Exchange procedure at issue in *Gilmer* also required the payment of forum fees, this Court did not address the forum fee issue in its opinion, and this Court may have erroneously believed that the employer paid all filing and forum fees under the NYSE employment arbitration rules then in effect. *See Green Tree*, 121 S.Ct. at 524 (Ginsburg, J., dissenting) ("the 'who pays' question presented in this case did not arise in *Gilmer*. Under the rules that governed in *Gilmer*—those of the New York Stock Exchange—it was the standard practice for securities industry parties, arbitrating employment disputes, to pay all of the arbitrators' fees"); *see also Cole v. Burns Int'l Security Servs.*, 105 F.3d at 1483.

Here, by contrast, the record establishes that arbitration under AAA's Commercial Rules is inordinately expensive for an hourly-wage worker. Moreover, a claimant's economic burden is heightened by Waffle House's insistence that "[t]he costs and expenses of the arbitration shall be born evenly by the parties." C.A. App. 26. *Any* mandatory arbitration procedure that imposes forum fees and other costs on an ADA claimant deprives that claimant of the substantive statutory right to the cost-free assistance of the EEOC. An agreement containing such procedures cannot be enforced without violating the ADA and well-established state contract laws of general applicability that prohibit enforcement of unconscionable contracts and contracts that violate statute-based public policy. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). The congressionally-guaranteed right to seek the EEOC's assistance (and to cost- and fee-shifting) under the ADA is no less important than the statutory right to compensatory or punitive damages or to the full period of the statute of limitation. None of these substantive statutory rights can be the subject of a compulsory, pre-dispute waiver, mandated by the employer as a condition of the worker's employment or continued employment.

Many courts, both federal and state, have concluded that mandatory arbitration agreements imposing high forum fee costs are unenforceable. Either because they violate the underlying statute under which plaintiff seeks to vindicate rights or because, as a matter of state contract law of general applicability under Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, they violate public policy as reflected in those statutes. In *Cole v. Burns Int'l Security Services*, 105 F.3d at 1468 (emphasis added), for example, the D.C. Circuit held:

> In our view, *an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims under Title VII* (any more than an employee can be made to pay a judge's salary). If there is any risk that an arbitration agreement can be construed to require this result, this would surely deter the bringing of arbitration and constitute a *de facto* forfeiture of the employee's statutory rights.

See also 105 F.3d at 1484 ("We are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case"). Similarly, in *Armendariz v. Foundation Health PsychCare Services, Inc.*, 24 Cal.4th 83 (2000), the California Supreme Court held that mandatory employment arbitration agreements are unenforceable to the extent they require a statutory claimant to pay forum fees or other arbitral costs that exceed what would be required for a filing in court. 24 Cal.4th at 110-11; *accord, Shankle v. B-G Maintenance Management*, 163 F.3d 1230, 1233-35 (10th Cir. 1999); *Paladino, supra*, 134 F.3d at 1062.

The protection against high economic hurdles is critical to the effective functioning of the ADA and other anti-discrimination statutes. The ADA, like Title VII, serves important public policies of compensation and deterrence. The broad remedial provisions of these statutes are designed not only to make victims of discrimination whole, but to serve as a "spur or catalyst" to induce employers to "endeavor to eliminate, so far as possible, the last vestiges" of discrimination. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). As Congress has noted in the Title VII context, practices that "limit [a prevailing plaintiff's] recovery of attorneys' fees, other fees, and other costs of litigation under Title VII . . . frustrate the intent of Congress to protect the public interest by eliminating employment discrimination and to ensure that victims of such discrimination be made whole for the losses they have suffered." H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78 (1991) *reprinted in* 1991 U.S.C.C.A.N. 694, 723. These goals can only be achieved if the process for resolving statutory claims contains essential safeguards against the erection of economic barriers that will chill, rather than encourage, vindication of protected statutory rights.

3. The Waffle House Mandatory Pre-Dispute Arbitration Agreement Contains No Language Putting Prospective Workers on Notice That it Effects a Waiver of Their Statutory Right to Seek Make-Whole Relief From the EEOC

In framing the question presented, the Petition for Writ of *Certiorari* "assume[s]" that Mr. Baker entered into a "valid" arbitration agreement with Waffle House that precluded him from pursuing a private right of

action for disability discrimination in state or federal court.[7] Of course, even if that assumption were true, the mere fact that Waffle House had a "valid" arbitration agreement with Mr. Baker does not mean that its agreement should be broadly construed as waiving Mr. Baker's statutory right to seek the cost-free assistance of the EEOC in obtaining make-whole relief.

However, nothing in the language of the Waffle House arbitration agreement even purports to effect such a waiver. Thus, even if Waffle House lawfully *could* force its workers to waive their right to seek the cost-free assistance of the EEOC in prosecuting claims of discrimination—which it could not, for the reasons we explain—there is no evidence in this case that Mr. Baker knowingly agreed to such a waiver. There was no "meeting of the minds."

Waffle House's arbitration agreement is completely silent as to any limitation on the scope of the EEOC's prosecutorial or remedial authority. The four-sentence arbitration agreement (written in the tiniest of seven-point type, smaller than even the copyright information) merely states:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchise of

[7] *See* Petition for *Certiorari* at 10 n.2 ("we assume, for purposes of this petition, that Baker and Waffle House entered into a valid agreement to arbitrate employment-related disputes"); Respondents' Brief in Opposition at 8-9 ("In its Petition, the EEOC asks this Court to review the Fourth Circuit's decision only insofar as it relates to the limitation on the EEOC's ability to seek 'make-whole' relief in a judicial forum on behalf of Baker").

> Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be born evenly by the parties.

C.A. App. 26. This agreement was not adequate to put Mr. Baker on notice that by applying for employment with the Waffle House restaurant in Columbus, South Carolina, he would be precluding the EEOC from litigating any ADA claim for damages or other make-whole relief on his behalf. There is no reference to the EEOC in this arbitration language. Nor is there any explicit waiver of Mr. Baker's statutory right under the ADA (or any other statute) to cooperate with the EEOC or to benefit from any relief achieved by the EEOC—whether accomplished through litigation, arbitration or mediation. *See* C.A. App. 30. Applying well-established principles of contract construction, the Waffle House arbitration agreement therefore should not be construed as precluding the EEOC from seeking the full range of statutory remedies, including individual relief.[8]

[8] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (citations omitted) ("respondents cannot overcome the common-law rule of contract interpretation that

(continued...)

Even though *amici* are required to accept for purposes of briefing in this case that Waffle House could have enforced its arbitration agreement against Mr. Baker in a private civil action for damages, *see supra* at 13-14 & n. 7, we vigorously dispute the truth of that assumption, and contend that the Waffle House agreement would not be judicially enforceable against Mr. Baker in *any* proceeding. Because that issue of enforceability is not before the Court, however, instead of arguing the point at length, we merely request the Court to make explicit in its opinion, to avoid future confusion, that the EEOC did not challenge the validity of the Waffle House agreement or its enforceability against Mr. Baker, and that the Court's opinion should not be construed as endorsing that assumption.

There are at least three reasons why, in *amici*'s view, the assumption of validity is incorrect. First, as pointed out in the dissent by Judge King, under applicable South Carolina law no "contract" was formed between Mr. Bak-

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[8] (...continued)
a court should construe ambiguous language against the interest of the party that drafted it. . . . The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result"); Restatement (Second) of Contracts §206 (1979) ("In choosing among the reasonable meanings of . . . [an] agreement or a term thereof, that meaning is generally preferred which operates against the [drafting] party . . ."); *First Options v. Kaplan*, 514 U.S. 938, 947 (1995) (citations omitted) ("the basic objective [is] to ensure that . . . arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties"); *cf. Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79 (1998) (emphasis in original) ("what federal law requires . . . is not a question which should be *presumed* to be included within the arbitration requirement").

er and the Waffle House restaurant where he worked. Pet. at 23a-27a. Second, as further pointed out by Judge King, Waffle House's mandatory arbitration agreement unlawfully deprived Mr. Baker of specific statutorily-protected rights, and was thus invalid both as a violation of the substantive statute and under state contract principles of general application. Pet. at 26a-27a n.16. Third, mandatory pre-dispute arbitration agreements imposed as a non-negotiable condition of employment do not contain the essential element of "voluntariness" that Congress required under Title VII and the ADA and that make arbitration agreements a matter of "consent, not coercion." *See, e.g., Mastrobuono, supra*, 514 U.S. at 57, *quoting Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989); *see* EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, No. 915002 (July 10, 1997); National Academy of Arbitrators' Statement and Guidelines, 103 Daily Labor Rep. (BNA) E-1 (May 29, 1997); Commission on the Future of Worker-Management Relations Report an Recommendations, 1994 Daily Labor Rep. (BNA) 105 (June 3, 1994).[9]

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[9] The ADA provides that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration is encouraged." 42 U.S.C. §12212. The legislative history explains that this provision clarified Congress' intent that employers should not be permitted to force workers to forfeit the statute's guaranteed access to a court and a jury trial. *See, e.g.*, H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3 at 76-77 (1990) ("The Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement

(continued...)

[9] (...continued)
provisions of this Act"); H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990) ("It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition could an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA"). When Congress incorporated this same language into Title VII the following year, *see* P.L. 102-166 §118, 105 Stat. 1071 (1991) codified as a historical and statutory note to 42 U.S.C. §1981, Congress again clarified that the "proviso is intended to supplement, not supplant, remedies provided by Title VII, and is not to be used to preclude rights and remedies that would otherwise be available." 137 Cong. Rec. H9505-01, H9530 (Nov. 7, 1991).

The degree of "voluntariness" needed to render a mandatory arbitration agreement enforceable has never been squarely addressed by this Court in any case, let alone in a case under the ADA. In *Gilmer*, 500 U.S. at 33, for example, a case arising under the ADEA, the Court avoided the voluntariness issue by noting that although Mr. Gilmer, as a securities industry broker, was required to sign a Form U-4 Registration Form and thereby to register with a national securities exchange, there was "no indication that Gilmer . . . was coerced . . . into agreeing to the arbitration clause in his registration application." In *Wright*, 525 U.S. at 82 n.2, which was an ADA case, the Court explicitly reserved the voluntariness question, stating: "Our conclusion that a union waiver of employee rights to a federal judicial forum for employment-discrimination claims must be clear and unmistakable means that, absent a clear waiver, it is not 'appropriate,' within the meaning of this provision of the ADA, to find an agreement to arbitrate. We take no position, however, on the effect of this provision in cases where a CBA clearly encompasses employment-discrimination claims, or in areas outside collective bargaining."

4. If a Victim of Discrimination Had the Same Rights in Arbitration as in Court, an Employer Would Have No Incentive to Require the Victim's Discrimination Claim to be Split Between an Arbitration Forum and a Judicial Forum

The Fourth Circuit's analysis rests upon the unstated assumption that Waffle House's mandatory arbitration program provides a fair, alternative forum for vindication of Mr. Baker's statutory anti-discrimination rights that is equivalent in all material respects to the judicial forum. Logically, however, if that "separate but equal" forum assumption were true, Waffle House would have had no incentive to urge any limitation on the EEOC's authority to pursue relief in this case.

It is neither efficient nor economical to litigate a single claim in two different forums. The *only* practical reason why Waffle House could be insisting that the remedial issues be divided between a judicial and an arbitral forum is because those two forums are *not* truly equal—either because the worker will get less relief from an arbitrator than a court, or because the worker cannot afford to, or is otherwise chilled from, individually pursuing his rights in the arbitration forum at all. And that is, indeed, what the studies show to be true.[10]

[10] As the California Supreme Court recently concluded in *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal.4th 83 (2000):

> [I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse

(continued...)

Waffle House does not dispute that the EEOC is already in court, seeking injunctive and other prospective relief on behalf of Mr. Baker or any other worker found to be the victim of discrimination. Because the underlying facts of his case are *already* being presented to the district court, requiring Mr. Baker's individual damages claims to be pursued in an arbitration rather than by the EEOC, in its already-ongoing litigation, could only *increase* Waffle House's costs, by forcing it to adjudicate overlapping issues in two separate forums. Only if those forums are not equivalent could Waffle House benefit from the position it asserts in this Court.

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[10] (...continued)
a job because of an arbitration requirement. While arbitration may have its advantages in terms of greater expedition, informality, and lower cost, it also has, from the employee's point of view, potential disadvantages: waiver of a right to a jury trial, limited discovery, and limited judicial review. *Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a "repeat player" in the arbitration system.* (Bingham, *Employment Arbitration: The Repeat Player Effect* (1997) 1 Employee Rts. & Employment Policy J. 189; Schwartz, [*Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33,]60-61.) It is perhaps for this reason that it is almost invariably the employer who seeks to compel arbitration. (See Schwartz, *supra*, 1997 Wis. L. Rev. at pp. 60-63.)

Id. at 115 (emphasis supplied).

CONCLUSION

For the reasons stated, the judgment of the Fourth Circuit should be reversed.

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Respectfully submitted,

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